

Exhibit 5

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Adv.Pro.No.
08-01789(BRL)

Debtor.

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IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,

Plaintiff,

Adv.Pro.No.
09-1182(BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.

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VIDEOTAPED DEPOSITION of JOSHUA L. NASH, as
taken by and before NANCY C. BENDISH, Certified
Court Reporter, RMR, CRR and Notary Public of the
States of New York and New Jersey, at the offices of
WEIL, GOTSHAL & MANGES, 767 Fifth Avenue, New York,
New York on Thursday, October 18, 2012, commencing
at 2:11 p.m.

1 Q. Do you know if your father ever spoke
2 with Mr. Madoff on the phone or via email?

3 A. No.

4 Q. What had your father heard about
5 Mr. Madoff in the investment community?

6 MS. PRINC: Object to form.

7 MR. LAFFEY: Do we have a standing
8 objection --

9 MR. STEINER: If anyone on this side
10 objects, it's an objection for all.

11 A. Repeat the question.

12 Q. What had your father heard about
13 Mr. Madoff in the investment community?

14 MS. PRINC: Object to form.

15 A. Impossible for me to answer because
16 it would have -- may have depended, you know, he was
17 in the investment -- my father was in the investment
18 business for 30, 35 years.

19 Q. Do you recall how you first heard of
20 Mr. Madoff?

21 A. Yes.

22 Q. How did you first hear of Mr. Madoff?

23 A. My father mentioned him to me in
24 respect of an investment that he had made.

25 Q. Do you recall when that was?

1 A. 1991, plus or minus a year or two.

2 Q. You mentioned that your father
3 invested with Mr. Madoff?

4 MS. PRINC: Object to form.

5 A. Yes.

6 Q. Was it with BLMIS?

7 A. Yes.

8 (Exhibit Trustee 75 marked for
9 identification.)

10 Q. Before you is a document that has
11 been marked as Trustee's exhibit number 75.

12 A. Um-hum.

13 Q. Have you ever seen this document?

14 A. No.

15 Q. Can you please turn to the third
16 page. On the second-to-last line after "very truly
17 yours," does that appear to be your father's
18 signature?

19 A. Yes.

20 Q. What drew your father to invest in
21 BLMIS?

22 MS. PRINC: Object to form.

23 A. He was introduced by a money manager
24 at Odyssey named Richard Spring, who spoke highly of
25 Mr. Madoff and his investments.

1 A. I don't recall.

2 Q. Based on your review of the account
3 statements, were you able to understand the strategy
4 that Mr. Madoff was using?

5 MS. PRINC: Object to form.

6 A. No.

7 Q. Did you discuss this with your
8 father?

9 A. Yes.

10 Q. What did you discuss?

11 A. We discussed how we didn't understand
12 how, by buying stocks, selling calls and buying
13 puts, one would have made money every month.

14 Q. Did you reach out to anyone at BLMIS
15 after reviewing the statements?

16 A. I didn't.

17 Q. Did your father?

18 A. He didn't reach out.

19 Q. Okay. What did he do?

20 A. He told Mr. Spring, who had
21 introduced him, that he wanted to get his money back
22 because he didn't understand how the money was being
23 made, thanked him for the introduction, but that he
24 was going to withdraw his account.

25 Q. And how did Mr. Spring react to this

1 discussion?

2 MS. PRINC: Object to form.

3 A. I don't recollect.

4 Q. Did you ever visit Mr. Madoff at his
5 office after reviewing the account statements?

6 A. Yes.

7 Q. Did you go with your father?

8 A. Yes.

9 Q. How many times did you visit
10 Mr. Madoff at his office?

11 A. Once, I believe.

12 Q. Do you know the approximate date of
13 that meeting?

14 A. On or around the time that my father
15 withdrew, closed the account. So I would guess
16 eight months after this was signed, but that's an
17 approximation.

18 Q. Do you know how that meeting was set
19 up?

20 A. Yes.

21 Q. How?

22 A. Mr. Spring told my father that if he
23 was willing to come over, Mr. Madoff would like to
24 explain how he made his money.

25 Q. Did you ask Mr. Madoff how he was

1 able to make the money?

2 MR. ALLERHAND: Why don't you
3 describe what happened at the meeting, rather
4 than...

5 A. My father and I went over to the
6 Lipstick Building, met with Mr. Madoff, Mr. Madoff
7 discussed his money making -- excuse me, market
8 making activities, as well as discussed some option
9 activities. And that was the substance of him
10 discussing his investment approach.

11 Q. Did Mr. Madoff describe to you his
12 investment strategy?

13 MS. PRINC: Object to form.

14 A. Vaguely. He said he had lots of
15 orders coming through, had a view and a look at the
16 market through a lot of orders that he got from
17 brokers, both in stocks and options and, therefore,
18 he was able to put these positions on.

19 Q. Were you satisfied with his
20 explanation?

21 MS. PRINC: Object to form.

22 Q. Let me rephrase. Were you
23 comfortable with his explanation?

24 A. No.

25 MS. PRINC: Object to form.

1 Q. Why were you not comfortable with his
2 explanation?

3 A. It wasn't, it wasn't clear to us how
4 he made the money. It also wasn't clear to us how
5 all these trades translated into individual
6 accounts.

7 Q. Did you ask Mr. Madoff how all the
8 trades translated into individual accounts?

9 A. Yes. Either I asked or my father
10 asked. I don't recall which of us asked.

11 Q. What was Mr. Madoff's response?

12 A. Something to the effect of, I
13 wouldn't worry about that because it all balances at
14 the end of the year. Balances or evens out,
15 something to that, I don't remember the exact words,
16 but that was the gist of it.

17 Q. What was your reaction to that
18 explanation by Mr. Madoff?

19 MS. PRINC: Object to form.

20 A. I don't know what my reaction -- I
21 don't know what the specific reaction was, but from
22 a business that was used to a formula of how one
23 allocated trades, it wasn't -- didn't seem a
24 satisfactory answer.

25 Q. Is there anything else you recall

1 about the meeting that you had with your father and
2 Mr. Madoff that we haven't already covered?

3 A. We had some discussion about the
4 accounting firm. My father in particular raised the
5 issue that why didn't Mr. Madoff have what at the
6 time was the Big Eight, a Big Eight accounting firm
7 for customer money.

8 Q. What is the Big Eight accounting firm
9 for customer money?

10 A. Well, there used to be. Now it's
11 what, the Big Four, the Big Three? There used to
12 be --

13 MR. ALLERHAND: The Final Four.

14 A. Final Four. There used to be eight
15 accounting firms that were regarded as the top major
16 firms, the Deloittes, Touche Ross. Many of these
17 have merged. Alan Andersen.

18 MR. ALLERHAND: Arthur Andersen.

19 A. Arthur Andersen. So that's what he
20 was referring to.

21 Q. Did your father expect that
22 Mr. Madoff would use one of the Big Eight accounting
23 firms?

24 MS. PRINC: Object to form.

25 A. We used Deloitte and most of the

1 partnerships we invested in used major accounting
2 firms.

3 Q. And why is that?

4 A. Whether it was true or not, it gave a
5 certain sense of satisfaction and comfort to
6 investors.

7 Q. When did you find out about
8 Mr. Madoff's accounting firm?

9 A. When my father asked the question --

10 Q. At the meeting?

11 A. -- at the meeting.

12 Q. Do you know who that accounting firm
13 was?

14 A. It had two or three names in it that
15 I didn't recognize.

16 Q. Were you concerned that Mr. Madoff
17 was not using one of the Big Eight accounting firms?

18 MS. PRINC: Object to form.

19 A. Yes.

20 Q. Why were you concerned?

21 A. Because most other firms used Big
22 Eight accounting firms and they were firms that one
23 knew about. Didn't mean they couldn't make
24 mistakes, but they were large, independent,
25 reputable firms.

1 Q. What did you know about Mr. Madoff's
2 accounting firm?

3 A. Nothing.

4 Q. Did it concern you that you knew
5 nothing about Mr. Madoff's accounting firm?

6 MS. PRINC: Object to form.

7 A. Yes.

8 Q. Did you at any time learn that
9 Mr. Madoff began the practice of exiting all
10 investments and holding only treasury bills at the
11 end of each quarter?

12 MS. PRINC: Object to form.

13 A. Yes.

14 Q. When did you become aware of that?

15 A. Don't recall.

16 Q. How did you become aware of that?

17 A. Don't recall.

18 Q. What was your reaction?

19 MS. PRINC: Object to form.

20 A. Didn't make sense.

21 Q. Why didn't it make sense?

22 A. Because I don't know what would be
23 magic about an end of a quarter or end of the year
24 that would, as part of an investment strategy, would
25 have one go to cash always at that period.

1 Q. So, did you see any reason why any
2 trading strategy would involve consistently exiting
3 the market at the end of every quarter?

4 MS. PRINC: Object to form.

5 A. I can't think of one.

6 Q. Why do you think Mr. Madoff
7 purportedly exited the market at the end of each
8 quarter?

9 MS. PRINC: Object to form.

10 A. No idea.

11 Q. Do you think that reduced
12 transparency into how Mr. Madoff's investment
13 strategy worked?

14 MS. PRINC: Object to form.

15 MR. ALLERHAND: I just have an
16 objection. He's here as a fact witness, not to
17 speculate as to why Mr. Madoff did or didn't do
18 certain things. I mean, any question you want to
19 ask about what he knows, what he discussed, what he
20 thought at the time. But I don't think he's here as
21 an expert witness to speculate as to why Madoff did
22 or didn't do certain things.

23 Q. Did your father withdraw his money
24 from BLMIS?

25 A. Yes.

1 Q. Any others?

2 A. Can't recall names, but after the
3 arrest of Mr. Madoff, one heard about a lot of names
4 that I've known over the years.

5 Q. After your meeting with Mr. Madoff,
6 did you form an opinion of Mr. Madoff?

7 MS. PRINC: Object to form.

8 A. Yes.

9 Q. What was that opinion?

10 A. He seemed very smart, somewhat
11 evasive.

12 Q. You testified that you were unable to
13 understand Mr. Madoff's investment strategy; is that
14 correct?

15 MS. PRINC: Object to form.

16 A. Yes.

17 Q. And you testified that you were
18 concerned because Mr. Madoff was not using one of
19 the Big Eight accounting firms?

20 A. Yes.

21 Q. Were there any other aspects of
22 Madoff that raised concerns?

23 MS. PRINC: Object to form.

24 A. The general principle that it
25 consistently, predictably made money.

1 A. We discussed that it had an
2 investment with Madoff, how much it had, and what
3 would happen to the fund going forward.

4 Q. When did you learn that Gabriel
5 Capital was invested with Madoff?

6 A. That night when I called him after
7 Madoff was arrested.

8 Q. How did you react to finding that
9 Gabriel Capital was invested with Madoff?

10 MS. PRINC: Object to form.

11 A. I was shocked and not pleased.

12 Q. Why were you shocked and not pleased?

13 A. I wasn't pleased because I just lost
14 some money. And I was shocked because I thought I
15 knew Ezra well and thought I knew what he did and
16 didn't expect to have Madoff in that fund.

17 Q. What did Mr. Merkin do that made you
18 surprised that he had Madoff in that fund?

19 MS. PRINC: Object to form.

20 A. Well, I wouldn't say it's what he
21 did, but he was an investor. I'd known him for a
22 long time. I had known him as an investor both in
23 risk arbitrage, which he began with, as well as
24 distressed debt. And I thought that was the
25 principal investing activities of Gabriel Capital.

1 bullish. So it would sometimes be a context like
2 that.

3 Other times it would be in the
4 context of a discussion about investment managers,
5 my guesses would be around investment committees.
6 So we might be -- I was on UJA, I was not on
7 Yeshiva, which was another one Ezra chaired. So we
8 might -- I might have asked Ezra how is UJA doing in
9 relation to how Yeshiva is doing; and there were
10 quite a number of times that, discussions like that,
11 should we look at other managers, what are you
12 looking at, what are we not. And there were a
13 number of occasions where the Yeshiva performance
14 may have been better and when I asked why, he would
15 say, Ezra would say, because Yeshiva has Madoff. So
16 those were the types of conversations we would have.

17 Q. So was it your understanding that UJA
18 did not have Madoff investments?

19 A. I was on the UJA committee and I knew
20 they didn't have it. So, yes.

21 Q. How did you respond to Mr. Merkin's
22 descriptions of Mr. Madoff?

23 MS. PRINC: Object to form.

24 A. When he talked about the market, I
25 don't -- you know, I don't recall whether I

1 commented or anything. In terms of the Yeshiva,
2 there were a couple of times I said, well, that's a
3 non-starter. Because as a fiduciary I wouldn't be
4 comfortable being a fiduciary of an endowment and
5 having investment in Madoff.

6 Q. As a fiduciary, why wouldn't you be
7 comfortable being a fiduciary and having investment
8 in Madoff?

9 MS. PRINC: Object to form.

10 A. My principal reason was the
11 accounting firm. As an individual, if one invests
12 with somebody and they don't have auditing
13 accounting firms or it's very highly speculative,
14 you have nobody to blame but yourself and if you
15 lose money, it's your own money. If you're a
16 fiduciary, you have a burden in a degree for others
17 and I did not feel comfortable if something were to
18 happen, that to me this was a potential flag. But
19 that was my personal view.

20 Q. You just said, to me this was a
21 personal flag?

22 A. No. The lack of a major accounting
23 firm to me was a red flag. But that was my
24 personal -- what I'm saying is that was my personal
25 view. Not everybody necessarily weighed that and

1 to my knowledge.

2 Q. When did you initially invest in
3 Gabriel?

4 A. My initial investment was mid to late
5 '90s. I think '97, if I would guess. The other
6 entities we discussed had different dates. I think
7 Jack Nash, the first one, was 1989.

8 Q. And when did the Nash Family
9 Partnership begin investing?

10 A. Don't recall.

11 Q. Why did you personally decide to
12 invest with Gabriel?

13 A. I got to know Ezra, I thought he was
14 smart. I thought that -- I liked the strategies as
15 I understood them, being risk arbitrage and
16 distressed. I like to invest with smart people and
17 strategies I understand.

18 Q. How much did you personally have
19 invested with Gabriel?

20 A. The initial investment I believe was
21 a million and a half or \$2 million.

22 Q. And over time did you continue to
23 place money with Gabriel?

24 A. I may have added once and I know I
25 took -- I withdrew some capital at one point, as